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Destructive Issue Linkages:

The Failure of Multilateral Trade-Competition Negotiations

ABSTRACT

Despite the proliferation of national competition rules at the domestic level, the pursuit of multilateral arrangements has encountered difficulties, especially when international negotiations link competition policy with trade policy. While the European Union has been the leading advocate of incorporating competition rules into the World Trade Organization, its efforts failed in 2003 with the collapse of negotiations at the Cancun Ministerial. This case resembles a natural experiment in which to compare the relative importance of two prominent issue linkages—trade-competition and competition-Singapore Issues—attempted by the EU in its failed efforts. Among the WTO members, developing countries appear to have played the most important role in the negotiation failure. They had invested few resources and little reputation in advancing the trade-competition linkage and expressed concern over the WTO as the appropriate venue in which to undertake further negotiations. They also opposed the trade-competition linkage because it was distant and indirectly linked to their trade priorities, they faced a related information asymmetry, and they viewed the inclusion of competition policy as a threat to their interests. Regarding the Singapore Issues, the developing countries opposed this linkage because it multiplied the resource costs associated with the trade-competition linkage and was not seen as complementary to their interests. While both linkages were ‘destructive’, a counterfactual analysis suggests that developing country opposition to the trade-competition linkage was the deciding factor in the failure.

I. INTRODUCTION

Despite the proliferation of national competition rules at the domestic level, negotiators have faced difficulties in reaching binding arrangements over competition policy at the multilateral level. A long history of international negotiations over the linkage between trade policy and competition policy has generated a number of non-binding multilateral initiatives—primarily through the United Nations Conference on Trade and Development (UNCTAD) and Organisation for Economic Cooperation and Development (OECD)¹—to regulate anticompetitive business practices that affect multiple jurisdictions. However, these initiatives have fallen short of aspirations to include competition policy in negotiations at the world’s pre-eminent trade institution, the World Trade Organization (WTO).

While the European Union (EU) has been the leading advocate of incorporating competition rules in the WTO, these efforts failed in 2003 with the collapse of negotiations at the Cancun Ministerial. By 2004, the General Council of the WTO had decided that work toward negotiations on the linkage between trade and competition policy would be suspended until the conclusion of the ongoing Doha Round.² To be sure, the linkage between competition policy and trade policy was not the sole reason for the collapse of the overall Cancun talks. But the failure of this

¹ Multilateral negotiations on competition policy have also taken place in the International Competition Network. These negotiations, however, do not produce binding rules and do not explicitly link competition policy with trade policy.

² World Trade Organization, *Doha Work Programme*, Decision Adopted by the General Council on 1 August 2004, WT/L/579, available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa.

negotiation linkage is puzzling because of the volume of previously successful multilateral initiatives to link the two policies. What happened at the WTO negotiations to doom the trade-competition linkage? To answer this question, the article focuses specifically on the reasons *why competition policy failed to be added formally to the WTO negotiating agenda*. Understanding this failure should help to illuminate the obstacles that will need to be overcome if similar pitfalls are to be avoided in post-Doha negotiations on competition policy and, more generally, the long-term pursuit of competition rules at the multilateral level.

This particular case is complicated by the fact that two different issue linkages were at play in the WTO negotiations. The complication, however, usefully resembles a natural experiment in which a number of factors are held constant across the two linkages, and a counterfactual analysis can be used to test the comparative importance of both linkages for contributing to the negotiation failure. For analytical clarity, the two linkages are disaggregated as separate negotiating tactics. First, competition policy was linked to trade policy. The EU's push for adding competition policy to the WTO agenda derives from a preference for binding mechanisms due to its unique domestic experience with regional integration. This position was reinforced by the considerable amount of resources and reputation that the EU had invested in achieving the linkage. Second, competition policy was linked with three other trade-related issues, the so-called Singapore Issues, as part of an indivisible negotiating package. Again, the EU had invested a considerable amount of resources and reputation in including competition policy among the Singapore Issues. This linkage, however, may have doomed competition policy at Cancun as it increased the number of areas for potential disagreement.

The analysis suggests that the primary cause of the EU's negotiating failure was the opposition of developing countries. They had invested few resources and little reputation in advancing the trade-competition linkage and expressed concern over the WTO as the appropriate venue in which to undertake further negotiations. They also opposed the trade-competition linkage because it was distant and indirectly linked to their trade priorities, they faced a related information asymmetry, and they viewed the inclusion of competition policy as a threat to their interests. Regarding the Singapore Issues, the developing countries opposed this linkage because it multiplied the resource costs associated with the trade-competition linkage and was not seen as complementary to their interests. While both linkages were 'destructive', a counterfactual analysis suggests that developing country opposition to the trade-competition linkage was the deciding factor in the failure. These empirical findings highlight the growing importance of developing countries in shaping the international competition and trading agendas.

The article proceeds in the following manner. The next section discusses theoretical insights from the literature on international negotiation and issue linkages, elaborates the two linkages at the core of the study and posits two testable hypotheses. The third section identifies the origins of the EU's preferences for the addition of competition policy to the WTO and contrasts them with the positions of the developing countries. The article then describes the historical development of the two linkages in different international organizations with particular emphasis on subsequent WTO ministerial conferences. The next section identifies the EU's position at Cancun with reference to the draft WTO negotiating text. The sixth section considers the extent to which the developing countries contributed to the failure to add competition policy to the WTO agenda. This section also undertakes a

counterfactual analysis to determine which linkage was the most important cause of negotiation failure. The article concludes with a summary of the findings and lessons learned for the possible future spread of competition rules at the multilateral level.

II. NEGOTIATION FAILURE AND ISSUE LINKAGES

The scholarly literature has identified a number of theoretical and methodological issues related to the structure, strategy, power, process, behaviour, effectiveness and outcome of international negotiations.³ The intent of this article is not to undertake an extensive literature review of the work in this area, but rather to highlight some of the more important insights relevant to the case in question, particularly those regarding negotiation failure and the role of issue linkage.

In this study, failure to add competition policy formally to the WTO negotiating agenda serves as the dependent variable. The existence of ‘failure’ is defined as an outcome of non-agreement.⁴ This use of the term ‘failure’ is not intended to convey a normative stance toward the outcome of the negotiations. Rather, such an outcome can follow from suboptimal coordination among states.⁵ As an alternative, ‘success’ in this case would have witnessed coordination among states that led to approval of the Draft Cancun Ministerial Declaration, specifically

³ See, e.g., JOHN ODELL, *NEGOTIATING THE WORLD ECONOMY* (2000); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); William I. Zartman, *What I Want to Know about Negotiations*, 7 *INTERNATIONAL NEGOTIATION* 5 (2002).

⁴ Arild Underdal, *Causes of Negotiation ‘Failure’*, 11 *EUROPEAN JOURNAL OF POLITICAL RESEARCH* 183 (1983).

⁵ Andrew Moravcsik, *A New Statecraft? Supranational Entrepreneurs and International Cooperation*, 53 *INTERNATIONAL ORGANIZATION* 267 (1999), at 274.

Paragraph 14 on competition policy.⁶ Given the absence of this alternative outcome, two interrelated and crucial concepts require clarification: negotiation failure and issue linkage.

For the purposes of this article, issue linkage is understood as a negotiating tactic (independent variable) that may increase or decrease the likelihood of failure (dependent variable). Sebenius provides a useful definition of issue linkage as a situation in which issues are ‘simultaneously discussed for joint settlement’.⁷ As a factor decreasing the likelihood of failure, issue linkage encourages behaviour that has been labelled variously as trade-offs, log-rolling, and side-payments. As a factor increasing the likelihood of failure, issue linkage increases the number of areas where disagreement can occur. Keohane notes that such ‘destructive linkages’ may follow from issue pairings ‘that are inconsistent with regime principles’.⁸ Such destructive linkages may also be viewed as ‘forced linkages’ which ‘contain the potential for eliciting strong negative reactions, which may overwhelm the original issues at stake’.⁹ Given this potential for linkages to be destructive, the failure to add competition policy to the WTO agenda may be explained by problems related to the tactic of issue linkage.

For analytical clarity, it is necessary to disaggregate two instances of tactical issue linkage that were at play in the WTO negotiations. First, an attempt was made to link competition policy with trade policy. This linkage may have generated opposition

⁶ World Trade Organization, *Draft Cancún Ministerial Text* (2003), available at http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm.

⁷ James Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INTERNATIONAL ORGANIZATION 281 (1983), at 287.

⁸ ROBERT O. KEOHANE, *AFTER HEGEMONY*, 92 (1984).

⁹ Sebenius, *supra* note 4, at 286.

because it directly threatened the interests of certain negotiators. At the same time, the linkage and its trade-related benefits may not have been sufficiently clear to certain negotiators. Such a lack of clarity can be particularly high when negotiating new, behind-the-border regulatory issues because of the high information asymmetries associated with linking such issues.

Second, four trade-related issues were linked into one package, the so-called Singapore Issues of government procurement, trade facilitation, investment, and competition policy. This call to negotiate the four Singapore Issues as one indivisible package may have increased the likelihood that competition policy failed to be added formally to the WTO negotiating agenda. For example, opposition directed exclusively at any one of the three non-competition Singapore Issues may have derailed efforts to add competition policy to the negotiating agenda because none of the four issues could be removed from the indivisible package and negotiated separately.

The presence of these two issue linkages offers a natural experiment in which a number of factors are held constant.¹⁰ The negotiations occurred over the same period of time within the same negotiating framework and comprised the same sets of actors. This allows the analyst to undertake a focused examination of the key causal factors by controlling for a wide variety of variables that could otherwise have affected the political decisions taken in such a comprehensive negotiation as a WTO trade round.

¹⁰ See, e.g., Gary Cox, Frances Rosenbluth & Michael Thies, *Electoral Rules, Career Ambitions, and Party Structure: Conservative Factions in Japan's Upper and Lower Houses*, 44 AMERICAN JOURNAL OF POLITICAL SCIENCE 115 (2000); Thad Dunning, *Improving Causal Inference: Strengths and Limitations of Natural Experiments* 61 POLITICAL RESEARCH QUARTERLY 282 (2008).

Based on the preceding discussion, Figure 1 summarises two different relationships that can be hypothesized between the independent variables (issue linkages) and the failure to add competition policy to the WTO negotiating agenda. The two linkages are selected as independent variables because they represent the two most prominent negotiating tactics employed by the EU in this case. Selecting the two linkages also allows the analyst to evaluate the impact of conflating four issues as a single negotiating package. This approach should help to determine whether competition policy failed to be added to the negotiating agenda as a result of objections specific to the trade-competition linkage or objections related to a non-competition Singapore Issue.

Figure 1: Hypotheses

<p>H1: Opposition to the trade-competition linkage led to the failure of competition policy to be added formally to the WTO negotiating agenda.</p> <p>H2: Opposition to at least one of the issues in the indivisible Singapore package led to the failure of competition policy to be added formally to the WTO negotiating agenda.</p>

By investigating *opposition* to each of these linkages, the study seeks to identify which linkage was most important for explaining the failure to add competition policy to the WTO negotiating agenda. A counterfactual analysis will be used to test the comparative importance of both linkages contributing to the negotiation failure.¹¹ In particular, the counterfactual analysis investigates the

¹¹ See, e.g., James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 *WORLD POLITICS* 169 (1991); Gary King & Langche Zeng, When Can History be Our Guide? The Pitfalls of Counterfactual Inference, 51 *INTERNATIONAL STUDIES QUARTERLY* 183 (2007); PHILIP

plausible and logical outcome of the negotiations if competition policy had not been linked to the Singapore Issues. Without evidence that competition policy would have been added to the WTO negotiating agenda as a single issue, the competition-Singapore Issues linkage cannot be identified as the primary cause of the negotiating failure. The relevant evidence for the comparison is drawn from the positions of the developing countries prior to the failure in Cancun.

The task of the following study is to examine the sources, extent, and nature of opposition that was generated by these two linkages. To do so, the article introduces original research based on the qualitative analysis of secondary sources and primary sources including public reports, official government documents, WTO declarations and decisions, and speeches by EU and other officials.

III. COMPETING POLICY PREFERENCES IN THE WTO CONTEXT

As Conceição-Heldt argues, ‘in order to understand issue linkage, one has to try to define the underlying preferences of the involved actors’.¹² Because the EU has been the most vocal advocate of incorporating competition policy into the WTO, it is worth investigating the Union’s preferences on the multilateralization of this policy.¹³

TETLOCK & AARON BELKIN, COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS (eds, 1996).

¹² Eugénia Conceição-Heldt, *Assessing the Impact of Issue Linkage in the Common Fisheries Policy* 13 INTERNATIONAL NEGOTIATION 285 (2008), at 286.

¹³ Eleanor M. Fox, *Toward World Antitrust and Market Access* 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (1997); David J. Gerber, *The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective* 34 NEW ENGLAND LAW REVIEW 123 (2000); Angela Wigger, COMPETING FOR COMPETITIVENESS: THE POLITICS OF THE TRANSFORMATION OF THE EU COMPETITION REGIME, 272-282 (2008).

The EU position can then be contrasted with the preferences of other members of the WTO. While it is not possible in the context of this article to explore the preferences of all WTO members, it is useful to explore the factors that motivated the general developing country opposition to adding competition policy to the negotiating agenda. The US and other advanced industrialized economies were also actively engaged in the negotiations. However, given their different preferences, they focused their energies on other issues and did not pursue active and strong opposition to either linkage, becoming merely unreliable partners for the EU.

The EU position on international competition policy can be described as a preference to pursue binding multilateral measures through the WTO. These measures would include subjecting individual competition decisions to the WTO's binding Dispute Settlement Mechanism (DSM).¹⁴ This preference can be understood as the result of the EU's internal and external approach to competition policy. Internally, the EU has exerted considerable effort and expended significant resources over the years pursuing the gradual and binding convergence of national regulation within its regional market. In addition to the binding harmonization of competition law in the

¹⁴ For official EU positions on the need for binding multilateral competition rules, see Leon Brittan, *Competition Policy and the Trading System: Towards International Rules in the WTO*, speech at the Institute for International Economics, Washington, DC, November 20 (1997); Leon Brittan, *A Framework for International Competition*, speech at the World Competition Forum, Davos, Switzerland, February 3 (1992); K. Mehta, *The Role of Competition in a Globalized Trade Environment*, speech at 3rd WTO Symposium on Competition Policy and the Multilateral Trading System, Geneva, April 17 (1999); Alexander Schaub, *International Co-operation in Antitrust Matters: Making the Point in the Wake of the Boeing/MDD Proceedings* 1 COMPETITION POLICY NEWSLETTER 2 (1998); Karel Van Miert, *Globalization of Competition: The Need for Global Governance*, speech at Vrije Universiteit Brussel, Brussels, Belgium, March 25 (1998).

Single European Market, the EU experience has included binding dispute resolution via the European Court of Justice.¹⁵ Given this domestic experience, it would appear quite natural for the EU to prefer a binding multilateral approach via an international organization—the WTO and its DSM—as the best means for addressing the international challenges facing competition policy.¹⁶

Externally, the EU's preference was uniquely shaped by the resources and reputation it had invested in the multilateralization of competition policy. The EU's active signalling since the early 1990s of an advocacy position increased the credibility of its commitment among trade negotiators prior to Cancun. A need to protect and enhance this reputation added further impetus to the EU's promotion of competition policy at the WTO because, as Keohane argues, a reputation 'becomes an important asset in persuading others to enter into agreements with it'.¹⁷ Reputation becomes an important asset especially in situations of repeated negotiations. Given the iterative nature of WTO negotiations, the EU wished to protect and enhance the advocacy reputation it had established on this issue by successfully adding it to the WTO negotiating agenda. The costs of backing down from the linkage are high because such a change of position could have damaged the EU's 'ability to reach mutually beneficial cross-issue deals' in the future.¹⁸

It is difficult to speak of one common position or coalition of developing

¹⁵ On the historical development and supranationalization of EU competition policy, *see* Gerber, *supra* note 13; David J. Gerber, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

¹⁶ Fox, *supra* note 13.

¹⁷ Keohane, *supra* note 8, at 94.

¹⁸ Lisa Martin, *International and Domestic Institutions in the EMU Process* 5 *ECONOMICS AND POLITICS* 125 (1993), at 129.

countries in general or specifically in relation to the multilateralization of competition policy. Nonetheless, some common factors can be identified that may help to explain the position of many developing countries. First, by the end of the 1990s, many developing countries were beginning to establish coalitions and promote actively their interests in international trade negotiations.¹⁹ Due to a growing diffusion of power in the WTO, developing countries were ‘focusing increasingly on specific issues of interest to them and working through negotiation processes to effect gains in their favor’.²⁰ Second, the developing countries believed that they had not benefited from previous trade rounds and that their priorities had not been given sufficient attention in WTO negotiations.²¹ Third, specific to competition policy, many developing countries did not have competition laws until the 1990s.²² This meant that many developing countries lacked significant policy expertise in the area and the technicalities of how it linked to trade policy. These three factors combined to create a general developing country position of wariness at expanding the negotiating agenda

¹⁹ Peter Drahos, *When the Weak Bargain with the Strong: Negotiations in the World Trade Organization* 8 INTERNATIONAL NEGOTIATION 79 (2003); AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO (2003); J. P. Singh, *Coalitions, Developing Countries, and International Trade: Research Findings and Prospects* 11 INTERNATIONAL NEGOTIATION 499 (2006).

²⁰ J. P. Singh, *Weak Powers and Globalism: The Impact of Plurality on Weak-Strong Negotiations in the International Economy* 5 INTERNATIONAL NEGOTIATION 449 (2000), at 478.

²¹ Kevin Gallagher, *Understanding Developing Country Resistance to the Doha Round* 15 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 62 (2008), at 73; Jacob Kol & L. Alan Winters, *The EU After Cancun: Can the Leopard Change its Spots?* 9 EUROPEAN FOREIGN AFFAIRS REVIEW 1 (2004), at 24.

²² Chad Damro, *The New Trade Politics and EU Competition Policy: Shopping for Convergence and Cooperation* 13 JOURNAL OF EUROPEAN PUBLIC POLICY 867 (2006), at 875.

and determination to make sure that any possible agreement resulted in clear trade benefits to them. Likewise, the developing countries had domestic experiences with competition policy that differed considerably from the EU and did not have an international advocacy reputation to protect or enhance in this area.

IV. MULTIPLE VENUES AND THE EMERGENCE OF THE TWO LINKAGES

Despite the failure in the Doha Round, competition policy continues to be treated as a trade-related issue in other international negotiations taking place outside the WTO. Since 2001, the International Competition Network in particular has pushed forward the multilateral competition agenda, but it does not explicitly link competition policy with trade policy. Rather, the multilateralization of competition policy and its links to trade have long been discussed in other international organizations. This section details two different venues—UNCTAD and OECD—that have explicitly linked the policies and provides a historical background of the emergence of the two linkages leading to the WTO’s Cancun Ministerial.

In the early twentieth century, states initiated efforts to increase cooperation in what is now known as competition policy. In particular, these early efforts focused on cooperation over the international prohibition of anticompetitive (or restrictive) business practices. As Fox describes

Trading nations have discussed the possibility of world disciplines against restrictive business practices since the mid- to late-1940s, when they contemplated and nearly adopted the Havana Charter [to establish the International Trade Organization]. Thereafter, nations formulated voluntary codes and principles in the context of the United Nations

Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD).²³

The common thread in all of these previous initiatives to link trade and competition policy has been their non-binding voluntary nature.

The OECD provided an important intergovernmental venue for increasing voluntary international cooperation among developed countries in competition matters. This cooperation began largely under a series of non-binding OECD Recommendations on Restrictive Business Practices Affecting International Trade. These non-binding recommendations were initiated by OECD members who noted that they had increasingly similar competition laws and would face increasingly similar problems as the global economy liberalized.²⁴ Because non-members, such as those with developing and centralized economies, typically did not have competition laws, the OECD Recommendations naturally focused on issues of importance to its developed members.

For the developing countries, non-binding international initiatives linking trade and competition were undertaken in a different venue, the UNCTAD. This organization formulated a host of initiatives to address restrictive business practices

²³ Eleanor M. Fox, *Antitrust Law on a Global Scale: Races Up, Down, and Sideways*, in REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (D. C. Esty & D. Geradin eds., 2001), at 350. For other discussions of the historical development of international competition policy, see Fox, *supra* note 13; Gerber, *supra* note 13; Allard D. Ham, *International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of American and the Commission of the European Communities* 30 COMMON MARKET LAW REVIEW 571 (1993).

²⁴ Organisation for Economic Cooperation and Development, *The Nature, History and Potential Benefits of Positive Comity* DAF/CLP/WP3(98)3 (1998), at 7.

and competition policy, including voluntary codes, handbooks, and even a Model Law on Competition to assist countries drafting competition laws for the first time. Most prominent among its competition-related initiatives are the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, released in 1980 and reviewed regularly.²⁵

Through the OECD and UNCTAD, developed and developing countries undertook formal initiatives that established the trade-competition linkage as an agenda item for further international deliberation. These deliberations took on a new momentum in the 1990s, with the EU's calls for an initiative on trade and competition policy at the WTO's First Ministerial Meeting in Singapore in 1996.²⁶ The Ministerial Declaration called for the establishment of a Working Group on the Interaction Between Trade and Competition Policy (WGTCP) 'to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework' (Paragraph 20).²⁷ The WGTCP was to 'draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora' (Paragraph 20). Thus, competition policy was linked as one of the four so-called Singapore Issues (along with investment, government procurement, and trade facilitation) that were to be negotiated as a package deal at

²⁵ Damro, *supra* note 22, at 875.

²⁶ Jagdish Bhagwati, *Don't Cry for Cancún* 83 FOREIGN AFFAIRS 52 (2004), at 60; Wigger, *supra* note 13, at 283.

²⁷ World Trade Organization, *Singapore Ministerial Declaration* (1996), available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

future WTO meetings. As Deese argues, ‘From its earliest roots, the Singapore Issues were fundamentally the EU’s agenda’.²⁸

During subsequent WTO meetings and following the Third Ministerial Conference in Seattle, the WGTCP’s mandate was renewed.²⁹ As the United States rejected EU calls for competition issues to be covered by the WTO’s binding dispute settlement mechanism, the WGTCP focused primarily on the identification of core competition principles. As for developing countries, the Singapore Issues had ‘acquired a symbolic importance by the Seattle Ministerial in 1999 as the blocking point for least developed and developing members that objected to major delays in the implementation of certain Uruguay Round agreements’.³⁰

In the Declaration of the Fourth Ministerial Conference in Doha, the WTO members recognized ‘the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area’ (Paragraph 23) and agreed ‘that negotiations will take place after the Fifth Session of the Ministerial Conference [Cancun] on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations’ (Paragraph 23).³¹ The Declaration also explicitly recognized the needs of developing countries and agreed to ‘work in cooperation with other relevant intergovernmental organizations, including

²⁸ DAVID A. DEESE, *WORLD TRADE POLITICS: POWER, PRINCIPLES, AND LEADERSHIP* (2008), at 146.

²⁹ See, World Trade Organization, *Seattle Ministerial Conference* (1999), available at http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm.

³⁰ Deese, *supra* note 28, at 147.

³¹ World Trade Organization, *Doha Ministerial Declaration* (2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs' (Paragraph 24). They instructed the WGTCP to work until the forthcoming Fifth Ministerial Conference on the clarification of core principles, including transparency, non-discrimination, and procedural fairness; provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building (Paragraph 25). Among the Singapore Issues, competition policy had survived due to the inclusion of technical assistance and capacity building provisions for developing countries.³²

Since the WTO's First Ministerial Conference, the EU had pushed for the inclusion of competition policy on the WTO agenda, even going so far as to suggest that it be discussed within the context of the WTO's binding DSM. At the same time, developing country concerns had continued to grow over the benefit of negotiating the Singapore Issues within the Doha Round. Despite these concerns, compromises were reached and competition policy and the Singapore Issues were up for negotiation at Cancun 'at EU insistence'.³³

V. CLARIFYING THE EU POSITION AT CANCUN

In the run-up to the WTO's Fifth Ministerial Conference to be held in Cancun in September 2003, the EU continued to play an active role in WGTCP deliberations and insist that competition policy officially be added to the WTO negotiating agenda. The EU continued to support publicly and invest a great deal of energy and reputation

³² Wigger, *supra* note 13, at 290.

³³ Kol & Winters, *supra* note 21, at 17.

in both the linkage between trade and competition policy and the linkage between competition policy and the other Singapore Issues.

On 21 July 2003, the EU's General Affairs and External Relations Council officially adopted the Union's position for the upcoming Cancun Ministerial. In the document, the Council addressed all four Singapore Issues as a single package arguing that

Cancun also needed to establish the modalities for the Singapore issues, thus ensuring the prompt formal launch of the negotiations agreed at Doha. The Council stressed that the launch of negotiations on all four of the Singapore issues at Cancun was necessary in order to preserve the principle of the single undertaking. In this regard the Council confirmed the objective of negotiating new WTO rules and disciplines in all four areas, and rejected suggestions that any one of the four Singapore issues might be removed from the scope of the single undertaking.³⁴

The EU position is reflected in the Draft Cancun Ministerial Declaration, which was submitted by WTO General Council chairperson Carlos Pérez del Castillo and Director-General Supachai Panitchpakdi on 31 August 2003, as a basis for discussions. The Draft Declaration noted, in Paragraph 14, two optional forms of language on competition policy that were up for consideration (see Figure 2), the former of which was supported by the EU.³⁵

³⁴ Council of the European Union, *External Relations*, 2522nd Council Meeting of General Affairs and External Relations, Brussels, 21 July, 11439.1.03 REV 1 (Presse 209) (2003), at 20.

³⁵ World Trade Organization, *supra* note 6.

Figure 2: Draft Cancun Ministerial Declaration on Competition Policy

14. [Taking note of the work done by the Working Group on the Interaction between Trade and Competition Policy under the mandate in paragraphs 23-25 of the Doha Ministerial Declaration, we decide to commence negotiations on the basis of the modalities set out in Annex E to this document.]

[We take note of the discussions that have taken place in the Working Group on the Interaction between Trade and Competition Policy since the Fourth Ministerial Conference. The situation does not provide a basis for the commencement of negotiations in this area. Accordingly, we decide that further clarification of the issues be undertaken in the Working Group.]

The EU clearly preferred the commencement of negotiations on the basis of the modalities set out in Annex E. An EU Background Note of 4 September stated that ‘only the text clearly indicating the launch of negotiations is satisfactory for the EU’.³⁶

Annex E on the Interaction between Trade and Competition Policy called for negotiations on ‘voluntary cooperation on anti-competitive practices which adversely affect international trade, in particular hardcore cartels... and assisting WTO Members in the establishment, implementation and enforcement of competition rules within their respective jurisdictions’ (Paragraph 1).³⁷ It also stated that ‘The

³⁶ Delegation of the European Union to Japan, *WTO Doha Development Agenda - Fifth ministerial meeting in Cancun EU position*, 2003/09/04, EU Background Note 01/03, (2003), available at http://www.deljpn.ec.europa.eu/home/news_en_newsobj556.php.

³⁷ World Trade Organization, *supra* note 6.

negotiations will not deal with state-to-state arrangements that limit competition or with practices implemented pursuant to such arrangements' (Paragraph 1). The Annex clarifies that the individual decisions of national competition authorities would not be subject to challenge under the DSM. Rather, consideration would be given to a possible peer review mechanism. The principle of non-discrimination would apply only to 'laws, regulations and guidelines of general application' and the principle of procedural fairness would 'respect the legal and judicial systems of each WTO Member' (Paragraph 2). Given the emphasis on voluntary cooperation and removal of the DSM from consideration, Annex E represents a scaling back from the EU's initial preference for binding WTO mechanisms to address competition issues.

With a nod toward the developing countries, Annex E reaffirms that 'full account shall be taken of the industrial policy, social policy and other needs of developing and least-developed country participants and appropriate flexibility provided to address them' (Paragraph 3). All Members would be assured their right to 'implement exceptions or exclusions from the application of national competition laws on the basis of transparent domestic legal processes' and developing and least-developed countries would be afforded transition periods (Paragraph 3). The Annex further notes that technical assistance and capacity building in developing and least-developed countries would be pursued through collaborative efforts with 'other international organizations, including UNCTAD, the World Bank, the OECD and others' (Paragraph 4). Finally, the Annex called for the establishment of a Negotiating Group on Trade and Competition Policy (Paragraph 5).

VI. THE FAILURE OF COMPETITION POLICY AT CANCUN

The negotiations in Cancun from 10-14 September 2003 served notice that competition policy would no longer be part of the Doha negotiations. Officially, this decision did not occur until 1 August 2004 with the General Council's Decision on the post-Cancun work programme, the so-called July Package. In this decision, the WTO's General Council agreed that competition policy, investment, and government procurement 'will not form part of the Work Programme set out in that [Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round' (1g).³⁸ Trade facilitation, however, survived the cut, and the commencement of negotiations on this one Singapore Issue was agreed on the basis of modalities set out in a separate annex.

In such a comprehensive negotiation, it is difficult to disentangle the various causes of overall failure and/or determine which are most important. What seems clear is that the two linkages at the centre of this study were not the only deal-breakers for the overall negotiations.³⁹ Nevertheless, they were important items that remained on the bargaining table and in play at Cancun. Indeed, at the actual negotiations, the EU's Trade Commissioner Pascal Lamy conceded that the Singapore Issues would not have to be negotiated as a package and 'indicated that he would have been willing to let go of investment and competition policy'.⁴⁰ This concession, however, does not explain the reason why competition policy failed to be added to the negotiating agenda. The question remains: Was the fate of competition policy sealed as a result of

³⁸ World Trade Organization, *supra* note 2.

³⁹ Some observers claim that disagreement over agriculture and/or TRIPs were the most contentious issues on the agenda. *See, e.g.*, Bhagwati, *supra* note 26; Kol & Winters, *supra* note 21.

⁴⁰ Bhagwati, *supra* note 26, at 61.

objections specific to the trade-competition linkage or objections related to the competition-Singapore Issues linkage?

It seems the fate of competition policy was sealed in the summer before the Cancun Ministerial was convened. To understand the demise of competition policy, it is instructive to investigate in more detail the positions of its opponents in the immediate run-up to Cancun. In particular, the final meeting of the WGTCP in May 2003 provided an early indication that trade-competition linkage would be problematic due the concerns of developing countries.

As noted above, the EU sought to add competition issues to the Doha Round as provided for in Annex E of the Draft Cancun Ministerial Declaration. This Annex identified the primary competition issue for inclusion as voluntary cooperation, especially on hardcore cartels. Marsden argues that such a commitment represented only an ‘indirect and distant link to trade’.⁴¹ The indirectness and distance of the link suggests that the purported trade-related benefits of adding competition policy to the negotiating agenda were not sufficiently clear to developing countries. Despite the EU’s submission of various documents to and participation in regular meetings of the WGTCP, the developing countries still faced an information asymmetry related to this issue linkage.

The developing countries clearly expressed their doubts over the wisdom and benefit of linking these two policies at the WGTCP meeting of 26-27 May 2003. Their various concerns were articulated most comprehensively in the intervention of the Nigerian Representative to the meeting. These concerns can be broadly

⁴¹ Philip Marsden, *Trade and Competition: Competition after Cancun: A Personal View*

COMPETITION LAW INSIGHT (2003), at 23, *available at*

http://www.biiicl.org/files/1108_comp_law_insight_-_cancun.pdf.

categorized as revolving around the adoption of competition law and establishment of enforcement agencies, the relationship between proposals and existing WTO principles and provisions, and the need for clarification (see Figure 3).⁴²

⁴² Working Group on the Interaction Between Trade and Competition Policy, *Report on the Meeting of 26-27 May 2003*, World Trade Organization, WT/WGTCP/M/22 (03-3705), 9 July (2003), at 5-6.

Figure 3: Developing Country Concerns

Adoption of competition law and establishment of relevant enforcement agencies

- Competition policy overshadowed by higher priorities
- Extent to which current proposals would allow for preservation of policy space in regard to developmental objectives as opposed to promoting market access and market presence or harmonization objectives
- Difficulties arising from disparities between countries and/or their firms in respect of levels of development and competitiveness, experience in the adoption or implementation of competition laws, and the capacity to implement such legislation
- Lack of clarity of and operational difficulties pertaining to the current proposals relating to core principles, hardcore cartels, and related matters

Relationship between proposals and...

- Existing WTO principles of transparency, non-discrimination, and procedural fairness
- Existing WTO provisions regarding confidentiality, consultations, and safeguards

Need for clarification on...

- Nature and treatment of *de jure* vs. *de facto* discrimination
- Role of exceptions
- Implications of principle of non-discrimination for treatment of local firms and industrial policies of developing countries
- Responsibility of exporting countries to take action in respect of export or

international cartels

- Scope of confidentiality provisions
- Modalities and experiences relating to voluntary cooperation
- Relationship between cooperation in multilateral framework and efforts to facilitate cooperation at bilateral and regional levels
- Balance and sequencing of commitments regarding adoption of competition legislation and international cooperation in relation to exports, imports, and role of bilateral competition or trade pressures
- Compliance mechanisms in multilateral framework, including dispute settlement and peer reviews
- Implications for national sovereignty and balance of rights and obligations of WTO Members
- Scope and content of any provisions regarding special and differential treatment, flexibility and progressivity
- Appropriateness of WTO as forum for cooperation in this area

Given this long list of concerns, it is easy to understand the preference of developing countries to avoid adding competition policy to the WTO negotiating agenda. As Figure 3 shows, the developing country concerns reflect an information asymmetry (vis-à-vis the EU) over the trade-competition linkage. Although the language of Annex E did not introduce a binding mechanism on any of the issues related to the linkage, it nevertheless represented a commitment to negotiate further on a variety of competition-related matters with which many developing countries had little domestic experience. As the last point in Figure 3 indicates, the developing countries also signalled their preference for venue-shopping—presumably with an eye

toward UNCTAD—by noting their concerns over the WTO as the most appropriate forum in which to undertake such further negotiations.⁴³

In addition, Figure 3 suggests that many developing countries viewed the trade-competition linkage as a threat to their interests. This can be seen in the point made by the Nigerian Representative regarding ‘policy space’ and related discussions over the resource implications of adding competition policy to the negotiating agenda. Gallagher defines ‘policy space’ as ‘the flexibility under trade rules that provides nation states with adequate room to maneuver to deploy effective policies to spur economic development’.⁴⁴ It often refers to targeted industrial policy or ‘space that allows developing countries a relatively larger role in economic development policy than is permitted by developed countries but that developed countries deployed during earlier stages of development’.⁴⁵ In this case, developing country concerns about policy space arise from a belief that incorporating competition policy into the WTO would constrain their sovereign ability to pursue development objectives with other selected policies that the developed members of the WTO would view as anti-competitive.

While the developing countries had not invested their reputations in the goal of adding competition policy to the WTO negotiating agenda, they did see negative resource implications for agreeing such an addition in the future. Despite the commitment to technical assistance and capacity building in Annex E (Paragraph 4), developing countries generally resisted committing to new negotiations on an issue

⁴³ On competition policy venue-shopping among international organizations, *see* Damro, *supra* note 22. For more on venue-shopping, *see* FRANK BAUMGARTNER & BRYAN JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

⁴⁴ Gallagher, *supra* note 21, at 63.

⁴⁵ *Ibid.*

area where they had little technical expertise. The incorporation of competition policy would stretch limited public resources that could be used elsewhere.⁴⁶ As Kol and Winters argue, competition policy ‘offered little to the developing countries and threatened to take skilled labour and political attention away from activities that are more important for economic development’.⁴⁷

Given that competition policy was distant and indirectly linked to trade and that the developing countries faced an information asymmetry and viewed competition policy as a threat to their interests, it is likely that developing country opposition to the trade-competition linkage led to the failure of competition policy to be added formally to the WTO negotiating agenda (H1).

But to what extent did the linkage to the Singapore Issues lead to the demise of competition policy? To be sure, the developing countries opposed negotiating the Singapore Issues as a single package. The threat to resources provides the clearest evidence of the problem related to the competition-Singapore Issues linkage. If a resource gap was problematic for the single trade-competition linkage, then the gap would be tripled or quadrupled under the competition-Singapore Issues linkage. In addition, the Singapore Issues were not seen by developing countries as complementary to their interests. As Kol and Winters argue, ‘The topics to be negotiated under each [Singapore] issue were not generally the key ones for developing countries and the clauses proposed by the EU not geared to development objectives’.⁴⁸ Thus, because the developing countries viewed the Singapore Issues as a drain on their resources and not corresponding with their interests, their opposition

⁴⁶ Bhagwati, *supra* note 26, at 61; Marsden, *supra* note 41, at 23.

⁴⁷ Kol & Winters, *supra* note 21, at 20.

⁴⁸ *Ibid*, at 17.

to the competition-Singapore Issues linkage likely lead to the failure to add competition policy to the WTO negotiating agenda (H2).

When viewed from the perspective of the developing countries, both linkages were destructive and seen as potentially ‘inconsistent with the [trade] regime principles’.⁴⁹ But how can we determine which linkage was most important for explaining the failure to add competition policy to the WTO negotiating agenda? At first look, it appears that competition policy failed because it was linked to the Singapore Issues as part of a package deal. From this perspective, opposition to one or more of the different Singapore Issues (especially investment and/or government procurement) caused the failure for competition policy. But if competition policy had been negotiated separately, would it have successfully been added to the negotiating agenda? The answer to this counterfactual is negative, and this can be seen in the opposition expressed by developing countries *specifically to competition policy* in the run-up to Cancun. In addition to the concerns detailed above, Khor notes that at the final WGTCP meeting in May 2003, ‘representatives of an even larger number of developing countries than normal spoke up and said that there was no convergence of views on several issues and that therefore more time was required to further discuss and clarify these issues, and negotiations could not proceed’ (2003: 2).⁵⁰

With the benefit of hindsight (per the July Package), it appears that only trade facilitation from among all four of the Singapore Issues would have had a chance to be added to the WTO negotiating agenda as a stand-alone issue.⁵¹ The finding that

⁴⁹ Keohane, *supra* note 8, at 92.

⁵⁰ Martin Khor, *Developing Countries Stress Lack of Consensus on Competition Issue in WTO*, TWN Info Service on WTO Issues (June03/1), Third World Network, Geneva, 2 June, available at <http://www.twinside.org.sg/title/twninfo23.htm>.

⁵¹ World Trade Organization, *supra* note 2.

competition policy would have failed to be added to the agenda even if it had been negotiated as a stand-alone issue confirms that the fundamental problems with the trade-competition linkage were the primary cause of the failure. Therefore, in the final analysis, the linkage to the Singapore Issues may have been a contributing factor that increased the likelihood of failure but not the deciding factor for the failure.

VII. CONCLUSIONS

Despite success at linking competition policy and trade in other multilateral organizations, the EU failed at Cancun to add this trade-related issue formally to the WTO's negotiating agenda. This article has identified two important linkages as sources of the failure. These two destructive linkages represent the most prominent negotiating tactics employed by the EU in this case. The case itself resembles a natural experiment that allows for an original comparative analysis of the destructiveness of a single issue linkage (trade-competition) with that of linking four issues as a single negotiating package (competition-Singapore Issues). By investigating opposition to both of these linkages, the study has sought to identify which one was most important for explaining the negotiation failure.

The EU's position on the multilateralization of competition policy and its linkage to trade in the WTO derives largely from its domestic integration experience with binding mechanisms and the resources and advocacy reputation that it has invested in the international process. The position of the other WTO members was informed by different domestic experiences and the fact that they had invested fewer resources and less reputation in the objective of adding competition policy to the negotiating agenda. Despite these differences, the EU and others were able to agree at the Singapore Ministerial Conference a compromise simply to discuss the trade-

competition linkage in the WTO's Working Group on Trade and Competition Policy. This agreement also linked competition policy to the other Singapore Issues as an indivisible package.

Overall the conclusions on the negotiations underline the growing importance of developing countries in shaping the international competition and trading agendas. The findings suggest that opposition from the developing countries specifically to the trade-competition linkage was the primary cause of the failure to add competition policy to the WTO negotiating agenda. Developing countries opposed this linkage because 1) it was distant and indirectly linked to trade, 2) they faced an information asymmetry on this linkage, 3) and they viewed competition policy as a threat to their interests (e.g. sovereign policy space and resource needs). While many of the developing country concerns were addressed in Annex E of the Draft Cancun Ministerial Declaration, matters were complicated by confusion surrounding the issue linkage and a feeling among developing countries that they had not benefited from previous trade rounds. In addition, the developing countries had invested few resources and little reputation in advancing the linkage and were concerned over the appropriateness of the WTO as the best venue in which to undertake further negotiations.

Developing countries also opposed the competition-Singapore Issues linkage because it multiplied the resource costs associated with the trade-competition linkage and was not seen as complementary to their interests. But was this linkage an equally important cause for the failure? The finding of a counterfactual analysis shows that competition policy would have failed to be added to the agenda even if it had been negotiated as a stand-alone issue, which confirms that the developing countries'

fundamental problems with the trade-competition linkage were the primary cause of the failure.

The preceding analysis has explored the conditions under which issue linkages may become destructive in international negotiations and the politics that arise from the linkage between trade and competition policy. Destructive linkages can diminish the likelihood of adding competition policy to multilateral negotiations when its inclusion can be undermined by venue-shopping opportunities, does not have significant levels of resources and reputation invested in it by negotiators, or is seen to conflict with the interests of some members (especially and increasingly developing countries). To overcome such negotiation pitfalls in a trade organization like the WTO, the trade-related benefits of linking competition policy and trade must be made explicit. Without explicit benefits and regardless of any actual merits of adding competition policy to the WTO, the linkage is only likely to meet with success in other established venues, such as the UNCTAD and OECD. This conclusion suggests that the degree of linkage clarity matters for success. Negotiations are in danger of failure when a professed link is unclear because states with little to gain are more likely to resist linkage. In this regard, the EU's failure at the WTO provides an instructive example of the very real challenges facing the spread of multilateral competition rules despite the proliferation of national competition laws.